



December 9, 2016

TO: The Office of Inspector General
RE: Request for Investigation of the National Organic Program

Dear Ms. Fong –

The Cornucopia Institute requests that the Office of Inspector General initiate an investigation into the activities of the USDA's National Organic Program (NOP). It is the position of The Cornucopia Institute that numerous NOP actions, and inactions, fail to conform to the intent and letter of the Organic Foods Production Act of 1990 (OFPA). Some of the activities detailed below appear illegal, others reflect ethical lapses, while still others are wasteful of taxpayer dollars.

Taken in aggregate this is a program violating the will of Congress and betraying stakeholders in the organic industry.

Specifically:

1. The NOP is allowing organic poultry production without outdoor access for birds; outdoor access is mandated by law. Federal organic standards state that organic livestock producers must “establish and maintain living conditions which accommodate the health and natural behavior of animals, including year-round access for all animals to the outdoors, shade, shelter, exercise areas, fresh air and direct sunlight suitable to the species” (7 CFR 205.239 (a)(1)). The same regulations state that “total continuous confinement of any animal indoors is prohibited” (7 CFR 205.239(a)(1)).

The excuse given, that the program is waiting to publish new rulemaking, is not valid. Draft regulations propose setting minimum space requirements for poultry indoors and outdoors. However, our organization has documented numerous examples of large industrial operations providing no outdoor access whatsoever. It does not require new rulemaking to carry out enforcement when such gross violations are taking place.

Furthermore, USDA Deputy Administrator Miles McEvoy, who oversees the NOP, issued a memo on 1/31/11 stating that "a producer must provide livestock with an opportunity to exit any barn or other enclosed structure."
<https://www.ams.usda.gov/sites/default/files/media/NOP-PM-11-5-AccessToOutdoors.pdf>

This would seem to invalidate, as a means for meeting the outdoor access requirement, small enclosed porches that some concentrated animal feeding operations (CAFOs) have

been attempting to identify as “outdoor” space in an attempt to meet the current legal requirements.

Cornucopia has filed formal complaints with the NOP's management documenting the continuous confinement of poultry, numbering tens of thousands of birds in single buildings. Documentation of these illegal practices includes aerial photography, witness testimony, and state regulatory documents. To date, the NOP has taken no enforcement actions.

2. The NOP has condoned, if not encouraged, the organic certification of hydroponic operations for the production of fruits and vegetables. Perhaps as many as 150 such facilities have been certified for organic produce production.

The practice of hydroponics conflicts with the precepts of OFPA as stated in SEC. 2114. [7 U.S.C. 6513] ORGANIC PLAN where (b)(1) describes the farm plan for organic crop production and soil fertility:

An organic plan shall contain provisions designed to foster soil fertility, primarily through the management of the organic content of the soil through proper tillage, crop rotation, and manuring.

And importantly, in the discussion of the Organic Plan in paragraph (g) of the same section, it states that the plan "shall not include any production or handling practices that are inconsistent with this title."

The federal organic regulations, at §205.203, detail soil fertility and crop nutrient management practices:

- (a) The producer must select and implement tillage and cultivation practices that maintain or improve the physical, chemical, and biological condition of soil and minimize soil erosion.
- (b) The producer must manage crop nutrients and soil fertility through rotations, cover crops, and the application of plant and animal materials.
- (c) The producer must manage plant and animal materials to maintain or improve soil organic matter content in a manner that does not contribute to contamination of crops, soil, or water by plant nutrients, pathogenic organisms, heavy metals, or residues of prohibited substances....

OFPA's §205.205 further details crop rotation practices expected in organic farming, and explicitly notes the need to "maintain or improve soil organic matter content."

These soil and crop rotation requirements are not fulfilled by hydroponic facilities that the USDA is allowing to sell certified organic produce in the United States.

And finally, like aquaculture (where the NOP has not allowed, to our knowledge, any certified organic production), no standards exist that would regulate hydroponics even if it wasn't illegal within OFPA and the current regulations. The NOSB has discussed this issue for a number of years, including having passed a prior resolution in 2010,

disallowing hydroponics in organics. The NOP has acted improperly by allowing certifiers to certify hydroponic operations.

3. Subsequent to legal complaints that were filed in 2007 and 2008, the NOP reviewed a prior decision made during the Bush administration and found that algae-based DHA oil, manufactured by Martek Biosciences, had been illegally added to a number of brands of organic infant formula and Horizon brand organic milk. This acknowledgement was contained in a memo by USDA Deputy Administrator Miles McEvoy.
<https://www.ams.usda.gov/sites/default/files/media/NOSB%20Memo%20Scope%20of%20Nutrient%20Vitamins%20and%20Minerals.pdf>

In the same memo, Mr. McEvoy stated that companies could petition the NOSB for use of DHA in organics, but that, in the interim, the NOP would issue a guidance instructing companies on the procedure for removal of DHA from certified organic products. That guidance was slated to be released before the end of 2010. It has never been issued.

In response to a petition, at the 2011 fall meeting of the National Organic Standards Board, the use of algae-based DHA oil was approved by the National Organic Standards Board, on December 2, 2011. However, the approval included an annotation prohibiting the use of hexane-extracted algae oil. Since that time, the NOP has not issued a federal rule adding the additive to the List of approved substances. Yet it continues to be used in organic food products.

It should be noted that there is no commercially available hexane-free DHA algae oil available. Thus, if the NOP had publish this rule, companies would have been forced to remove it from their organic formulations. Again, this appears to be allowing illegal activities for the benefit of commercial interests.

4. The NOP has frequently chosen to rely upon the opinion of its independent certification agents when responding to complaints alleging violation of organic regulations.

Instead of NOP staff, or a third-party, conducting investigations, the NOP defers questions regarding the propriety of certification of these facilities to the certifiers who initially certified the operations. Based on a review of internal NOP documents obtained from a FOIA request, there are impropriety cases where the certifiers have acted incompetently and/or in collusion with those they are certifying. For the NOP to hand over this responsibility to parties who could be co-conspirators, or incompetent, is highly inappropriate.

For example, in 2014 The Cornucopia Institute filed 14 complaints with the NOP alleging violations of organic regulations at organic livestock facilities managing dairy cows and poultry.

<https://www.cornucopia.org/2014/12/investigation-factory-farms-producing-massive-quantities-organic-milk-eggs/>

The complaints were buttressed by aerial photography and other documentary evidence of alleged livestock management violations occurring on the facilities. All 14 complaints were dismissed without any independent investigation by the NOP, which exclusively relied upon feedback from the certification agents for its determination of dismissal.

The practice of relying on certifiers for investigation and enforcement ignores the possibility that the certifier is unqualified, has operated incompetently, negligently, or even in collusion with the facility operator. The NOP has a responsibility to independently investigate when such a broad pattern of abuse is brought to their attention.

A number of previous complaints filed by The Cornucopia Institute concerning organic regulatory violations have been found meritorious by the NOP. Our organization's staff includes scientists with doctorates in agriculture and related disciplines and a seasoned policy analyst with decades of industry experience. It seems implausible that the organization's complaints concerning widespread abuses in organic livestock management, involving hundreds of thousands of animals, did not rise to the level demanding an independent assessment by NOP enforcement officials.

5. In October 2015, Cornucopia refiled all 14 complaints against the certifiers responsible for overseeing the aforementioned allegedly illegal operations.

We did this because the NOP's [Instruction: National Organic Program Complaint Handling Procedure](#) states that when receiving a complaint against a certifier it is retained for direct investigation by the NOP's Compliance and Enforcement division.

It has now been nearly 14 months since we reissued these complaints to the NOP and we have received no response whatsoever.

6. On more than one occasion, the NOP has allowed organic certificate holders to continue to engage in organic commerce after being found in "willful" violation of the law. For example, Shamrock Dairy, based in Phoenix AZ, was found to be in "willful" violation of organic livestock management regulations by NOP investigators. Yet the facility, packaging organic milk for sale to consumers, was allowed to continue in organic commerce.

This particular example resulted in the defrauding of thousands of organic consumers buying milk from this company and believing that the milk was indeed in compliance with federal organic standards.

7. The Shamrock Dairy case, noted above, exemplifies another area of problematic management at the NOP – the secrecy that surrounds its enforcement actions. The only reason that the details of this case are known is because of a Freedom of Information Act request by The Cornucopia Institute. Cornucopia had filed the initial complaint on Shamrock's livestock management practices in 2008, and sought information regarding its disposition with a FOIA request filed in 2012 (after NOP staff refused to answer simple questions about the status of the case).

Only this year has that information been partially provided – and only after filing a lawsuit in federal court alleging violation of FOIA. Without the FOIA request, it is unlikely that the public would have ever known what transpired at Shamrock or the serious nature of the findings. Some documents appear to still have been withheld as the case continues to be adjudicated.

Other enforcement details that the NOP has released reveal little about the nature of the violations that have occurred. What is the deterrent effect of this limited information if the offender's abuses are not revealed?

8. The NOP is embroiled in a number of federal lawsuits as a result of its program management. These lawsuits include challenges to the arbitrary and capricious changes to rules allowing for the use of synthetic materials in organics and the Sunset process; appointments of unqualified individuals to the NOSB (based on OFPA requirements); and the allowance of persistent synthetic pesticide contaminants in compost used in organic agriculture.
9. The NOP is squandering hundreds of thousands of taxpayer dollars in FOIA costs due to its reluctance to operate with transparency, withholding documents from the public. The online posting of NOP materials and/or NOP responses to questions from the public would mitigate many FOIA requests.

Instead, the deliberate obfuscation of the NOP has led to court actions. The Cornucopia Institute has filed ten FOIA lawsuits seeking public documents. The USDA has already settled one of the cases, after providing the documents, and will likely similarly settle the remaining lawsuits. The majority of these cases have been lost by default, as the NOP has released previously withheld documents. Taxpayer dollars are paying for legal costs as well as the processing of the documents that could have easily been provided under a more transparent management approach. At the last NOSB meeting Mr. McEvoy estimated the labor just to process the FOIA requests at \$500,000.

10. The management of the NOP has allowed significant conflicts of interest in decision making by the NOSB. In the most recent example, a fulltime employee of the fruit company Driscoll's (Carmela Beck), was allowed to vote on matters related to hydroponic production in organics.

Driscoll's is believed to be the largest domestic producer of hydroponically grown berries, with facilities in both Mexico and the United States. The hydroponics debate concerned its legality as an organic system of production. Millions of dollars are potentially at stake for Driscoll's.

The NOSB's own Policies and Procedures Manual describes conflicts as an action that could:

- Directly and disproportionately benefits you or a person associated with that member;
- Could impair your objectivity in representing your group; or
- Has the potential to create an unfair competitive advantage.

The NOP rejected the notion that there was any conflict of interest in Ms. Beck making decisions that affect hydroponic producers. Likewise, potential conflicts of interest were also not addressed for NOSB member Zea Sonnebend (paid by organic certifier CCOF for her board participation with CCOF acknowledging certification of "about 130" hydroponic operations) and board chair Tracey Favre (newly appointed CEO of organic certifier QAI, also another certifier of major hydroponic facilities).

11. The NOP management also faces an unresolved ethics complaint concerning Mr. McEvoy. Cornucopia is aware of the situation as both of its codirectors gave statements, under oath, to an investigator from the USDA's Agricultural Marketing Service. At a previous NOSB meeting Mr. McEvoy publicly stated that the investigation was closed without finding any culpability on his part. When Cornucopia codirectors asked about the disposition of the case and for copies of the statements they gave, it was indicated the statements could not be released because the investigation was still ongoing. If that is accurate, Mr. McEvoy made a false statement to the public. The situation also leaves unresolved the fact that the NOP is part of AMS and it appears that the AMS is investigating itself.

We would like to share a copy of our depositions with your office. Doing so would fully outline the allegations of ethical improprieties against Mr. McEvoy (including asking representatives of entities in the organic industry, who he is charged with regulating, for letters of support at a time when his performance was being openly challenged). We hope that you can obtain these documents that are being withheld from us directly from AMS.

We respectfully request that the matters detailed above provide the basis for a broad investigation into the activities of the USDA's National Organic Program. Millions of consumers purchase certified organic products expecting that the highest standards and ethics are involved in their production and in the process outlined by Congress to oversee the industry.

Thousands of ethical farmers are involved in organic agriculture and deserve the protection of their business and practices from doubt, illegalities, and unfair competition, which may impact their ability to continue farming while employing the practices they believe in as outlined by the Organic Food Production Act that codified this movement into law.

Please keep us informed of the status of this request.

Sincerely,



Will Fantle, Codirector